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In the Supreme Court of the United States

OCTOBER TERM, 1978

DECATURVILLE SPORTSWEAR CO., INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Petitioners contend that the court of appeals erred in holding that the Board's order, directing its Administrative Law Judge to conduct a hearing on the General Counsel's unfair labor practice complaint, was not a final order reviewable by the court of appeals under 29 U.S.C. 160(f).

1. The background of the current proceeding may be summarized as follows:

In 1969 the court of appeals affirmed the Board's finding that petitioners had engaged in certain unfair labor practices and enforced the Board's order remedying those violations of the Act. *Decaturville Sportswear Co.* v. *National Labor Relations Board*, 406 F. 2d 886 (C.A. 6). Thereafter, the Board petitioned the court to adjudge

the companies in civil contempt for allegedly failing to comply with the enforcement decree. In particular the Board contended that petitioners had violated the decree by discharging an employee, Nelson Rushing, in 1970, by discharging other workers who struck and picketed in sympathy with Rushing, by denying reinstatement to sympathy strikers, and by discharging and refusing to hire employees because of their union activities or sympathies. A special master, appointed by the court, recommended granting the Board's contempt petition in certain respects and denying it in others (Pet. App. A-30 to A-93).

The court of appeals affirmed the special master's findings in all respects. In affirming the special master's recommendations against enforcing the contempt petition in certain respects, the court stated:

> To hold Respondents in civil contempt we must find clear and convincing evidence in the record which proves that Respondents have violated a judgment of this Court. * * * A contempt proceeding is a setting very different from a normal proceeding for the enforcement of a Board order. The burden imposed by the clear and convincing evidence standard is heavy. The Board has failed to demonstrate that the Special Master erred in his findings or conclusions.

National Labor Relations Board v. *Decaturville Sportswear Co.*, 518 F. 2d 788, 790 (C.A. 6). The Board's petition for a writ of certiorari to review that decision was denied on October 20, 1975. 423 U.S. 913.

Subsequently, in 1976, the General Counsel issued unfair labor practice complaints (later consolidated) against petitioners, who had been the subject of the earlier contempt petition, and three affiliated companies not

involved in the earlier contempt proceedings (Pet. App. A-94 to A-136).[1] The complaint charged the companies with unfair labor practices relating to the strikes and picketing resulting from the discharge of Rushing and other employees at the Decaturville plant in 1970. Specifically the complaint alleged that the companies denied reinstatement to more than 350 strikers, including some 60 strikers involved in the earlier contempt proceeding against petitioners, in violation of Section 8(a)(1) and (3) of the Act (Pet. App. A-102 to A-105, A-107 to A-110, A-116 to A-119, A-124 to A-126, A-134 to A-136).[2] A hearing on the consolidated complaint was scheduled before an Administrative Law Judge (Pet. App. A-105). On April 7, 1977, the Administrative Law Judge recommended dismissal of the consolidated complaint in its entirety on the ground that the earlier contempt determination barred litigation of the unfair labor practice issues, under principles of "*res judicata* or *collateral estoppel*" (Pet. App. A-23 to A-29).

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[1]The three additional companies are Russell Sportswear Corporation; M. Hoffman & Company, Inc.; and Landlubber Alabama, Inc. (Pet. App. A-120, A-128).

[2]Although employees at the plant of Russell Sportswear Corporation also struck in sympathy with Rushing and the other Decaturville strikers and were discharged and subsequently denied reinstatement, the Board did not assert those discharges in its contempt petition against petitioners. Rather it initiated a separate unfair labor practice proceeding with respect to the discharge and denial of reinstatement of the Russell employees. In 1973 the court of appeals first denied enforcement of the Board's order which found that Russell had committed unfair labor practices, but then vacated its judgment and remanded the matter to the Board for further evidentiary proceedings. *National Labor Relations Board* v. *Russell Sportswear Corp.*, 71 CCH Lab. Cas. para. 13,667, 72 CCH Lab. Cas. para. 13,905. Those proceedings were then consolidated with the unfair labor practice complaint against petitioners (see Pet. App. A-21 to A-22).

On September 16, 1977, the Board reversed the Administrative Law Judge's holding that "a contempt proceeding, such as the *Decaturville* decision, which involves an application of the 'clear and convincing evidence' standard, cannot bar a subsequent unfair labor practice proceeding involving a different cause of action, different parties, and a 'preponderance of the evidence' burden of proof" (Pet. App. A-16). The Board ordered that the record be reopened and a hearing held on the unfair labor practice complaint before the Administrative Law Judge (Pet. App. A-16 to A-17).

On December 29, 1977, the companies filed a petition in the court of appeals to review the Board's order and stay the unfair labor practice hearing (Pet. App. A-4 to A-13). The Board moved to dismiss the petition to review on the ground that its order directing a hearing on the unfair labor practice complaint was not a "final order," subject to judicial review under Section 10(f) of the Act.[3] On March 30, 1978, the court of appeals issued an order dismissing the petition to review and denying the request for a stay of the unfair labor practice hearing (Pet. App. A-1 to A-2). The court held that the order of the Board sought to be reviewed "is not a final order within the meaning of § 10(f) of the National Labor Relations Act" and that, "upon the conclusion of

[3]Section 10(f), 29 U.S.C. 160(f) provides, in relevant part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

the administrative hearing and the issuance of a proper order by the Board, the petitioners, if still aggrieved, will be able to seek review in this Court" (Pet. App. A-2).[4]

3. The court below correctly determined that the Board's order reopening the record and directing a further hearing is not a final order reviewable in the courts of appeals under Section 10(f) of the Act. See *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 409: "The statute on its face * * * indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices * * *." As the court of appeals noted (Pet. App. A-2), if the Board ultimately finds that petitioners have committed unfair labor practices, as alleged in the complaint, and issues an order remedying the violations found, petitioners may secure judicial review at that time of all of their claims, including the claim that the Board's findings and remedies are barred by *res judicata* or collateral estoppel. On the other hand, the Board may find in petitioners' favor on the merits of the complaint, and thus make recourse to the court of appeals or this Court unnecessary. That statutory procedure provides an adequate and exclusive remedy for alleged error in unfair labor practice proceedings before the Board, while at the same time serving the interest of judicial economy. *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 48; *Thompson Products* v. *National Labor Relations Board*, 133 F. 2d 637, 640 (C.A. 6); *Sears, Roebuck and Co.* v. *National Labor Relations Board*, 433 F. 2d 210, 211 (C.A. 6).[5]

[4]The court's order (Pet. App. A-1 to A-2) also denied a motion that the Board had filed in the contempt proceeding requesting that the court clarify its decision there by holding that it was not intended to bar the Board from litigating the pending unfair labor practice issues under principles of *res judicata* or collateral estoppel.

[5]Cases cited by petitioners (Pet. 13-14) are inapposite. In *International Union of Mine, Mill & Smelter Workers, Local*

Petitioners' effort to enjoin the unfair labor practice proceeding in advance of a final adjudication of the complaint is "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem, supra*, 303 U.S. at 50-51. Contrary to petitioners' suggestion (Pet. 14), the expense, time, and effort involved in litigating the case before the Board does not justify an exception to the rule requiring exhaustion. *Id.* at 51. Contrary to petitioners' contention (Pet. 12-13), an exception to the exhaustion and final order doctrine is not warranted by their claim that the issues now before the Board have been determined favorably to them in prior proceedings before the court of appeals. See *Armco Steel Corporation* v. *Ordman*, 414 F. 2d 259, 260-261 (C.A. 6). That contention may be reviewed, under the

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Nos. 15, 17, 107, 108 and 111 v. *Eagle-Picher Mining & Smelting Company*, 325 U.S. 335, the Court held that the Board could not reopen an unfair labor practice proceeding, with a view to providing additional relief, where it had already issued a final remedial order and that order had merged into a final court decree with which the employer had long since complied. All other cases cited by petitioners involve situations in which the courts held that agency action was ripe for judicial review because no further proceedings were contemplated and the complaining party had no other avenue of relief available. See *Waterway Terminals Company* v. *National Labor Relations Board*, 467 F. 2d 1011, 1015, 1017 (C.A. 9) (employer sought review of order quashing notice of hearing in lieu of determining alleged jurisdictional dispute under Section 10(k) of the Act); *International Ladies' Garment Workers Union, Local 415-475* v. *National Labor Relations Board*, 501 F. 2d 823, 830 (C.A. D.C.) and *Leeds & Northrup Company* v. *National Labor Relations Board*, 357 F. 2d 527, 531-533 (C.A. 3) (charging party sought review of withdrawal of an unfair labor practice complaint, pursuant to informal settlement, and denial of an evidentiary hearing on objections to settlement).

normal statutory review procedure, if petitioners are aggrieved by the final order issued by the Board on completion of the unfair labor practice proceeding.[6]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Since the court of appeals never reached the merits of petitioners' *res judicata*/collateral estoppel arguments (Pet. App. A-1 to A-2), the second question sought to be presented by the petition (pp. 3, 15-22) is not properly before the Court. Petitioners' arguments in any event are insubstantial. As the Board noted, the difference between the "clear and convincing" standard of proof applicable in contempt proceedings and the "preponderance of the evidence" standard appliable in unfair labor practice proceedings would preclude the invocation of *res judicata* or collateral estoppel even if the parties or factual issues were the same. See, *e.g.*, *Peterson* v. *Clark Leasing Corp.*, 451 F. 2d 1291, 1292 (C.A. 9). Cf. *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235. Petitioners' argument (Pet. 15-22) makes no reference to the differences in burden of proof.

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